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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

NO. 73-848

JACK A. FUSARI, Commissioner of Labor of the State of Connecticut, Administrator, Unemployment Compensation Act,

Appellant,

-v-

LARRY STEINBERG, CECIL PASKEWITZ, DELIA TRIANA, and JUAN MIRANDA,

Appellees,

ON APPEAL FROM A THREE-JUDGE

UNITED STATES DISTRICT COURT FOR THE

DISTRICT OF CONNECTICUT

MOTION TO AFFIRM

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Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the judgment of the Three-Judge District Court, dated September 19, 1973 be affirmed on the following grounds:

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(1) The only substantial issue raised in Appellant's Jurisdictional Statement--the precise form of hearing mandated by the Due Process Clause as a prerequisite to terminating unemployment compensation benefits--is not yet ripe for review by this Court because the Court below has not yet ruled on the issue.

(2) The remaining issues raised in Appellant's Jurisdictional Statement are so insubstantial as to warrant no review by this Court.

OPINION BELOW

The memorandum opinion of the Three-Judge District Court, (Honorable J.Joseph Smith, United States Senior Circuit Judge, Honorable M.Jospeh Blumenfeld, Chief Judge United States District Court, and Honorable Jon O. Newman, United States District Judge) dated September 17, 1973 is set forth in the Appendix to Appellant s Jurisdictional Statement (hereinafter J.S.A.) at pages 1A-25A. The District Court's judgment, dated September 19, 1973 is attached hereto as Appendix A.

QUESTION PRESENTED

1. Whether the Three-Judge District Court correctly decided that the Appellant's procedures for terminating unemployment compensation benefits fail to provide sufficient procedural due

process in light of the Court's findings that Appellant's procedures: (1) Provided virtually no advance notice prior to termination; (2) Provided no opportunity to confront adverse witnesses; (3) Provided no opportunity to consult with counsel; (4) Permitted the fact-finding examiner to go beyond the record of the "seated interview" in making his decision; and (5) Provided a perfunctory statutory citation to persons whose benefits were terminated.

STATEMENT OF THE CASE

Appellees do not take issue with the statement of the case as set forth in the Appellant's Jurisdictional Statement but wish to supplement that statement with the following information.

Unemployment insurance benefits in Connecticut are paid entirely out of a trust fund maintained by the contributions of in-state employers, including interest and penalties. So long as the state program meets federal statutory requirements, its costs of administration are met by the federal government, pursuant to Section 302 of the Social Security Act, 42 U.S.C. Section 502. The Social Security Act requires, inter alia, that states receiving such assistance have methods of administration "reasonably calculated to insure full payment of unemployment compensation when due," 42 U.S.C. Section 502 (a) (1).

The claimant's entry into the unemployment compensation system begins with the filing of a valid initiating claim. The state system of determining initial eligibility is not under attack

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here. After a determination of initial eligibility is made, the claimant is instructed to report bi-weekly to his local unemployment compensation office. Upon reporting, he fills out a "Continued Claim for Unemployment Compensation", upon which he swears to his availability for work and his "reasonable efforts" to find work, among other things. The claimant also fills out a "Continued Claim Work Effort Information Form," when making his bi-weekly visit. He then enters the claims line and eventually presents the completed forms to an employee of the Unemployment Compensation Department. If no questions arise, the claimant is routinely given his benefit checks for the preceeding two-week period.

If the claims line employee raises an issue of possible disqualification, he immediately sends the claimant to another line for a "seated interview". Upon reaching the head of this line, the claimant is interviewed by a "Fact-Finding Examiner", who seeks to ascertain facts as to possible disqualification. If the examiner decides that the claimant is in fact qualified to receive benefits for the period in issue, he simply sends him back to the claims line, and checks are issued. If, however, the examiner decides that the claimant does not meet the statutory criteria for receiving assistance, the claimant is not given his checks, and is told that he will receive written notification of the Department's decision concerning his eligibility for the weeks in question. The written notification is a form letter reciting a perfunctory statutory citation as the basis for disqualification.

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Of necessity, questions will often arise during the "seated interview" which involve third-party information. If such a question arises, the fact finder will attempt to contact the third party while the claimant is present, and will take the information into consideration when reaching a decision. However, if the third party cannot be reached, the claims examiner may still proceed to make his own determination as to eligibility.

The most common reason for the denial of benefits to a claimant is for failure to comply with Connecticut General Statutes, Section 31-235(a), which requires that applicants make "reasonable efforts to obtain work" and be "able" and "available" for work. These statutory requirements account for between 60 and 70 percent of all denials of benefits resulting from "seated interviews". 1/

Once the claimant receives written notice of the fact-finder's decision, he may file an appeal which is heard by an Unemployment Compensation Commissioner. No attack is made in this suit upon

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1/ The Department deviates from its "seated interview" procedure in at least two instances. If an employee of the State Employment Service Department has provided information that a claimant has refused to accept a job referral, notice is sent to the claimant scheduling a hearing for a date and time certain and advising claimant of the reason for the hearing and of his right to bring counsel and witnesses. The claimant then has the right to confront the employer at this hearing. In the routine case, benefits continue until the hearing is held. Similarly, if information concerning the refusal of a suitable job comes from an interested employer - one whose "merit rating"account has been charged because of the termination of the claimant's employment -notice of a proposed hearing is sent both to the claimant and the employer and a procedure similar to the one above is followed.

However, since the majority of cases involve a fact-finder's determination that the claimant has not made reasonable efforts to find work, a pre-termination hearing with the procedural safeguards of advance notice and opportunity to bring counsel and witnesses is the exception rather than the rule.

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the procedures employed at the Commissioners' hearing, except to emphasize the finding of the lower court that in the month of December, 1972, 89.8 percent of all appeals took over 100 days to decide; 61.4 percent took over 125 days; while 29.5 percent consumed over 150 days before the Commissioner's decision. As the lower court noted; "(f)igures from other months strongly suggest that the December figures are not unrepresentative". 2/

A review of the factual situations of three of the named Appellees will serve to put the general background outlined above into sharper perspective. Larry Steinberg had filed a valid initiating claim for benefits in April, 1971, and received weekly benefits through October 9 of that year. On October 27, Steinberg reported to the Unemployment Office for his regular bi-weekly visit, and was directed from the claims line to a "seated interview". After some discussion with a fact-finder, Steinberg was told that he would not receive the two-weekly checks at issue, for alleged failure to use "sufficient efforts to obtain work". Steinberg filed an appeal to the Unemployment Compensation Commission and a hearing was held on January 13, 1972. On May 10, 1972 the Commissioner upheld the Departmental fact-finder. Steinberg did not seek review in the courts.

The second Appellee, Delia Triana had received Unemployment benefits from June 18 through July 8, 1972. On July 24, 1972, she reported to the Unemployment Office in Bridgeport to file for benefits checks covering the preceeding two weeks. Her checks

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2/ See J.S.A., at 18A,n.21 and 22 for a complete table of figures.

were withheld at the claims line and she was directed to a "seated interview", where it was decided that she had not made sufficient efforts to find work for the two periods, and she did not receive her checks. At two subsequent bi-weekly appointments, Mrs. Triana was disqualified from receiving benefits for the period between July 29, 1972 and August 18, 1972 on similar grounds. Mrs. Triana filed a prompt appeal and after a hearing, the Commissioner upheld the denial of benefits for the first two-week period, but held that Mrs. Triana was entitled to benefits for the latter period. The Commissioner's findings of fact included the finding that Mrs. Triana "...was desperate for work and sought all types of work in the local labor market." The Commissioner's decision was not appealed by either side.

A third Appellee, Juan Miranda presents a similar situation. At his "seated interview", in August he was denied benefits on the grounds of having made insufficient efforts to find work. He was notified in September that all claims from August 13, 1972 onward, were disapproved on the above grounds. He filed a prompt notice of appeal; hearing was held on October 17, 1972. On October 24, 1972, the Commissioner held that the benefits from August 13 to the date of the appeal hearing were wrongly withheld. The Department did not appeal.

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ARGUMENT

THE COURT BELOW CORRECTLY DECIDED THAT APPELLANT'S PROCEDURES FOR TERMINATING UNEMPLOYMENT COMPENSATION BENEFITS FAIL TO PROVIDE SUFFICIENT PROCEDURAL DUE PROCESS

Appellant's Jurisdictional Statement characterizes this appeal as presenting broad issues of national importance. J.S., at 3-4. A careful reading of the opinion and judgment of the Court below, however, reveals that this appeal actually presents the narrow issue of whether the Court below correctly decided that Appellant's current procedures for terminating unemployment compensation benefits fail to provide sufficient procedural due process.

In its opinion, the Court below adhered to recent Supreme Court decisions which mandate a two-step inquiry into the type of procedural due process claims raised by Appellees in this case. See generally Board of Regents v. Roth, 408 U.S. 593 at 576-579 (1972); Perry v. Sinderman, 408 U.S. 593 at 599-603 (1972); Fuentes v. Shevin, 407 U.S. 67, at 89-90, n.20 and n.21.(1972). The District Court's first step involved a determination of whether the interest which persons receiving unemployment compensation benefits have in the receipt of those benefits is an interest "encompassed within the Fourteenth Amendment's protection of liberty and property", Roth, supra, at 571 and thereby safeguarded by some form of procedural due process.

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The Court below concluded that Appellees had a sufficient "property" interest to trigger Fourteenth Amendment due process requirement. J.S.A., 19-A. This portion of the District Court's opinion is not open to serious challenge in light of Supreme Court decisions mandating some form of procedural due process safeguards for the following "property" interests; Wages, Sniadach v. Family Finance Corporation; 395 U.S. 377 (1969); welfare benefits; Goldberg v. Kelly, 397 U.S. 254 (1970); reputation, Wisconsin v. Constantieau, 400 U.S. 433 (1971) marriage dissolution, Boddie v. Connecticut, 401 U.S. 371 (1971); driver's license, Bell v. Burson, 402 U.S. 535 (1971); custody rights, Stanley v. Illinois, 405 U.S. 645 (1972); consumer goods purchased pursuant to a conditional sale contract, Fuentes v. Shevin, supra; de facto tenure rights of teacher, Perry v. Sinderman, supra.

The Court below then proceeded to the second step of the inquiry which requires a determination of the "form of procedural due process....necessary to protect the particular 'property' interest involved". J.S.A., 20-A. The Court below did not fully answer this question in its opinion. Instead, the Court limited its ruling to the narrow issue of whether Appellant's current termination procedures provided sufficient procedural due process. The Court below, after examining a large volume of documents, stipulations and other materials introduced as exhibits at the trial, and hearing the testimony of witnesses at the trial, concluded that Appellant's current procedures were not adequate:

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> ....we still think it clear that the 'seated interview' system does not provide sufficient procedural due process. Claimants are provided with virtually no advance notice of the interview, or the precise issues involved, and consequently have no opportunity to either prepare their arguments or present witnesses on their behalf. No opportunity is presented to confront adverse witnesses; no opportunity is provided to consult with counsel. The fact-finding examiner may go beyond the record of the 'seated interview' in making his decision; when that decision is made, the only explanation a claimant receives is a perfunctory citation to a statutory section concerning disqualifications.
> J.S.A., 20-A.

It should be noted that the Court's findings were based on lengthy stipulations submitted to the Court below (J.S.A., 2-A), including stipulations describing the characteristics of Appellant's termination procedures which the Court concluded denied Appellees sufficient procedural due process. See J.S.A., at 2-A, 7-A.

Appellant then does not dispute the District Court's findings but rather urges this Court to hold that the termination procedures meet "minimal due process requirements of the Fourteenth Amendment" J.S.-3, Questions Presented.

A brief review of several of the due process deficiencies noted by the Court below and pertinent decisions of this Court clearly demonstrates that Appellant's current procedures fall far short of minimal due process requirements.

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A. Lack of Advance Notice

The "advance notice" of possible disqualification given claimants under Appellant's current procedures was set forth in stipulations submitted to the District Court and is outlined by the Court at J.S.A., 2A-3A:

> After a determination of (initial) eligibility is made, the claimant is instructed to report bi-weekly to his local unemployment office.....If no questions arise (in the claims line) the claimant is routinely given his benefit checks for the two-week period at issue. If the claims line employee raises an issue of possible disqualification, he sends the claimant to another line for a "seated interview". Upon reaching the head of this line, the claimant is interviewed by a "Fact-finding Examiner", who seeks to ascertain facts as to possible disqualification .....If, however, the examiner decides that the claimant does not meet the statutory criteria for receiving assistance, the claimant is not given his checks....

The claimant, then, first learns of a question regarding his eligibility after reaching the head of the claims line to receive his benefits and must argue for sustaining his benefits "on the spot".

The function of advance notice is to inform the recipient of the nature of the evidence against him in advance of the hearing so that he may have an adequate opportunity to contest its accuracy. Morgan v. Central Hanover Trust Company, 339 U.S. 306, 314 (1950). This Court long ago recognized the importance of advance notice in Roller v. Holly, 176 U.S. 398, 409-410 (1900):

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> It is manifest that the requirement of notice would be of no value whatever, unless such notice were reasonable and adequate for the purpose...a man should not be required...instantly to answer a charge...on the same or even the next day and should be allowed not only time to obtain legal advice and assistance, but also to collect his evidence, and even the convenience of witnesses should be considered.....

B. No Opportunity To Confront Adverse Witnesses

The Court below noted that, "Of necessity questions will often arise during the 'seated interview' which involves third-party information". J.S.A., 3-A., but claimants are not allowed to confront third-parties supplying adverse information.

Without the historic right of confrontation and cross-examination, a claimant is often powerless to rebut charges made against him for, as this Court recognized in Green v. McElroy, 360 U.S. 474 (1959), the claimants are at the mercy of "individuals whose memory may be faulty or who, in fact, might be perjurers or who are motivated by malice, vindictiveness, intolerance, prejudice or jealousy." Green, supra at 487. See also Goldberg, supra, at 269-270.

Appellant's present termination procedures, therefore, deny recipients advance notice before termination, the right to confront adverse witnesses and other deficiencies in minimum procedural due process set forth at J.S.A., 20-A. Moreover, as noted

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by the Court below, the risk of arbitrary termination of benefits under Appellant's present procedures is enhanced by virtue of the vague disqualification standards[3] applied by fact-finding examiners:

> But when an administrator is making as objective a determination as one involving "reasonable efforts" at finding work, the procedures adopted must at least allow the claimant opportunity to fairly and completely present his side of the case, and to meet any unfavorable evidence. This the present system does not do. J.S.A., 20-A.

The sole basis for Appellant's appeal rests upon this Court's summary affirmance in Torres v. New York State Department of Labor 408 U.S. 949 (1972). The Court below devoted a major portion of its opinion (J.S.A., 10A-19A) to a discussion of the Torres case and concluded that it was foreclosed from considering Appellees' claims which were based upon the Social Security Act, 42 U.S.C. § 503(a)(1), but was not foreclosed from an independent appraisal of the merits of Appellees' constitutional claim. Whatever the merit of Appellant's claim that this Court should resolve the uncertainty created by its summary affirmance in Torres[4], it is clear that the question of the precise form of hearing mandated by the Due Process Clause in the context of unemployment benefits is not yet ripe for review in the instant case.

3/ Connecticut's statutory disqualification sections for unemployment compensation (Conn. Gen. Stats. §§ 31-235 and 236) are set forth in J.S.A., 26A-27A.

4/ It is significant that the reasoning of the District Court majority opinion in Torres has not been adopted by any other ruling on similar issues. See Wheeler v. State of Vermont, 335 F.Supp. 856 (D.Vt. 1971); Crow v. California Department of Human Resources, 325 F.Supp. 1314 (N.D. Cal. 1970); Hiatt v. Indiana Employment Security Division, 347 F.Supp. 218 (N.D.Ind 1971); vacated and remanded sub nom Indiana Employment Security v. Burney, 409 U.S. 540, 93 S.Ct. 883, 35 L.Ed. 2d 62 (1973); Pregent v. New Hampshire Department of Employment Security, 361 F.Supp. 782 (New Hamp. 1973).

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Appellees urged the Court below to rule that they and members of their class were entitled the same procedural safeguards afforded welfare recipients in Goldberg, supra, but the Court below issued a much narrower holding. The Court declined, at that point, to specify the precise procedures which Appellant was required to implement: "Of course, the choice of methods to bring its procedures into compliance with the Due Process Clause rests with the State". J.S.A., 24-A. Despite the District Court's suggestion that Appellant submit revised termination procedures, Appellant chose to appeal to this Court before the Court below had an opportunity to fashion a final remedy.

Appellees therefore, urge this Court to affirm the District Court Judgment entered below. Presumably, the Appellant will then submit revised procedures to govern the termination of unemployment benefits. If Appellees object to the proposed procedures, the District Court will, possibly after further hearings, fashion a final remedy specifying the precise procedural steps required to satisfy due process. If either party appeals from this subsequent court order, this Court will have the benefit of the District Court's findings of fact and analysis of the revised termination procedures and, if necessary, this Court can then decide the important issue of the form of hearing mandated by the Due Process Clause in the context of unemployment compensation benefits.

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CONCLUSION

For the foregoing reasons, the Court should affirm the Judgment below without argument or further briefing .

RESPECTFULLY SUBMITTED,

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APPENDIX A
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NEW HAVEN

APPENDIX A

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

FILED
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U.S. DISTRICT COURT
NEW HAVEN, CONN.

LARRY STEINBERG and CECIL PASKEWITZ and DELIA TRIANA and JUAN MIRANDA)
)
v.) CIVIL NO. 15,104
)
JACK A. FUSARI, Commissioner of Labor, The Administrator, The Unemployment Compensation Act, State of Connecticut)

JUDGMENT

This action having come on for hearing on the merits before a three-judge District Court, convened pursuant to 28 USC §§ 2281 and 2284, The Honorable J. Joseph Smith, United States Senior Circuit Judge, The Honorable M. Joseph Blumenfeld, Chief Judge, United States District Court, and The Honorable Jon O. Newman, United States District Judge, presiding, and the Court having rendered its Memorandum of Decision, Findings of Fact and Conclusions of Law under date of September 17, 1973, finding that the "seated interview" system as currently used for terminating or suspending the payment of unemployment compensation benefits does not provide minimal due process under the Fourteenth Amendment to the Constitution,

It is ORDERED and ADJUDGED that the defendant Administrator, his successors in office, agents, and employees are hereby enjoined from administering Chapter 567, Conn. Gen. Stat. (§31-222 et seq.) in such a manner as to deprive members of the plaintiff class of unemployment benefits without first according them a constitutionally sufficient prior hearing.

Dated at New Haven, Connecticut, this 19th day of September, 1973.

Sylvester A. Markowski
Clerk, United States District Court

By: Frances J. Angelo
Deputy In Charge

APPROVED:

United States Senior Circuit Judge

Chief Judge, United States District Court

United States District Judge